No. 88-169

In the Supreme Court of the United States

OCTOBER TERM, 1988

SAMUEL LORING MORISON, PETITIONER

v.

UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FOURTH CIRCUIT

BRIEF FOR THE UNITED STATES IN OPPOSITION

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QUESTIONS PRESENTED

1. Whether 18 U.S.C. 793(d), which proscribes the delivery of material or information relating to the national defense to "any person not entitled to receive it," and 18 U.S.C. 793(e), which proscribes the unauthorized retention of material or information relating to the national defense, apply to a federal employee who steals classified intelligence materials for the purpose of leaking them to representatives of the press.

2. Whether petitioner, who stole classified photographs and internal reports from the Naval Intelligence Support Center, was properly convicted under the theft-of-government-property statute, 18 U.S.C. 641.

3. Whether 18 U.S.C. 641 and 793(d) and (e) are unconstitutionally vague or overbroad.

TABLE OF CONTENTS

TABLE OF AUTHORITIES

Cases:

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OPINIONS BELOW

The opinion of the court of appeals (Pet. App. 1a-60a) is reported at 844 F.2d 1057. The memorandum and order of the district court (Pet. App. 61a-77a) is reported at 604 F. Supp. 655.

JURISDICTION

The judgment of the court of appeals (Pet. App. 78a) was issued on April 1, 1988, and a petition for rehearing was denied on April 29, 1988 (Pet. App. 79a-80a). On June 16, 1988, the Chief Justice extended the time within which to file a petition for a writ of certiorari to and including July 28, 1988, and the petition was filed on that date. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

STATUTES INVOLVED

Section 641 (18 U.S.C.) provides:

> Whoever embezzles, steals, purloins, or knowingly converts to his use or the use of another, or without authority, sells, conveys or disposes of any record, voucher, money, or thing of value of the United States or of any department or agency thereof, or any property made or being made under contract for the United States or any department or agency thereof; or
>
> Whoever receives, conceals, or retains the same with intent to convert it to his use or gain, knowing it to have been embezzled, stolen, purloined or converted—
>
> Shall be fined not more than $10,000 or imprisoned not more than ten years, or both; but if the value of such property does not exceed the sum of $100, he shall be fined not more than $1,000 or imprisoned not more than one year, or both.
>
> The word "value" means face, par, or market value, or cost price, either wholesale or retail, whichever is greater.

Section 793 (18 U.S.C.) provides in pertinent part:

* * * * *

> (d) Whoever, lawfully having possession of, access to, control over, or being entrusted with any * * * photograph * * * relating to the national defense * * *, willfully communicates, delivers, transmits or causes to be communicated, delivered or transmitted * * * the same to any person not entitled to receive it * * *; or
>
> (e) Whoever having unauthorized possession of, access to, or control over any document, writing, * * * or note relating to the national defense, or information relating to the national defense which information the possessor has reason to believe could

be used to the injury of the United States or to the advantage of any foreign nation, * * * willfully retains the same and fails to deliver it to the officer or employee of the United States entitled to receive it;

* * * * *

Shall be fined not more than $10,000 or imprisoned not more than ten years, or both.

* * * * *

STATEMENT

Following a jury trial in the United States District Court for the District of Maryland, petitioner was convicted of delivering classified photographs relating to the national defense to a person not authorized to receive them (Count 1), in violation of 18 U.S.C. 793(d); willfully retaining classified information relating to the national defense and failing to deliver it to the person entitled to receive it (Count 3), in violation of 18 U.S.C. 793(e); and theft of government property (Counts 2 and 4), in violation of 18 U.S.C. 641. He was sentenced to concurrent terms of two years' imprisonment on each count. The court of appeals affirmed (Pet. App. 1a-60a).

1. The evidence at trial, which is not in dispute, is summarized in the court of appeals' opinion (Pet. App. 3a-9a) and in the government's brief in the court of appeals (at 3-16). It showed that from 1974 until October 1984 petitioner was employed at the Naval Intelligence Support Center (NISC) in Suitland, Maryland. During 1984, petitioner was the analyst for Soviet amphibious and hospital ships and mine warfare at NISC, and he had a security clearance of Top Secret-Sensitive Compartmented Information. To obtain that clearance, petitioner signed a Non-Disclosure Agreement, in which he acknowledged,

among other things, that he was " 'obligated by law and regulation not to disclose any classified information in an unauthorized fashion' " (Pet. App. 3a, quoting the Non-Disclosure Agreement) and that such disclosure may violate, inter alia, 18 U.S.C. 793. Petitioner worked in a "vaulted" area to which only persons with Top Secret clearances were admitted. Because access to the area was restricted, employees within the vaulted area were permitted to leave classified documents uncovered on their desks. Pet. App. 3a-4a; Gov't C.A. Br. 3-4.

Also during 1984, petitioner was employed as editor of the American section of *Jane's Fighting Ships* (JFS), a British magazine, published annually, that provided current information on international naval operations. Petitioner signed a memorandum prepared by his superiors in which he agreed not to use government materials or equipment in connection with his work for JFS and acknowledged that he would not obtain classified information on the U.S. Navy or extract unclassified data on any subject and forward it to the magazine. In 1984, petitioner also began working for a second British publication, *Jane's Defence Weekly,* but he did so without seeking or receiving permission from his superiors. Unhappy with his employment at NISC, petitioner wrote a series of letters during the summer of 1984 to JFS representatives seeking full-time employment with *Jane's Defence Weekly.* He also interviewed for a job with Derek Wood, the editor-in-chief of the weekly magazine. Pet. App. 4a; Gov't C.A. Br. 4-5.

On July 24, 1984, a naval architect at NISC placed four glossy photographs on a desk approximately ten feet from petitioner's desk. The photographs, taken by a KH-11 photo-reconnaissance satellite, depicted a Soviet aircraft carrier under construction in a Black Sea naval shipyard. The photographs were dated July 14, 15, 19, and 20, and on their borders were stamped the words "Secret" and

"Warning Notice: Intelligence Sources or Methods Involved." The naval architect had been given the photographs so that he could analyze the capabilities of the carrier under construction. Pet. App. 5a-6a; Gov't C.A. Br. 5-6.

The architect retrieved one of the four photographs from the desk on July 25, 1984. On July 30, however, he discovered that the remaining three photographs were missing.[1] One of the three photographs thereafter appeared on the cover of the August 11 issue of *Jane's Defence Weekly,* and the other two photographs appeared in the lead article. Petitioner showed an advance copy of the issue to his supervisor on August 9, and acknowledged that the photographs could give away the nation's intelligence capabilities. Petitioner denied, however, that he had stolen the photographs. Nevertheless, on that same day, petitioner placed a telephone call to Derek Wood, the *Jane's Defence Weekly* editor-in-chief, and assured him that the photographs could not be traced to him. In early August, *Jane's Defence Weekly* paid petitioner $300 for "editorial contributions" in July 1984. And when JFS later returned the three photographs to United States authorities, petitioner's fingerprint was on one of them. Pet. App. 6a-7a; Gov't C.A. Br. 6-9.

On August 22, 1984, investigators seized petitioner's office typewriter ribbon. A subsequent analysis of the ribbon revealed that petitioner had composed numerous letters to *Jane's Defence Weekly,* including one, addressed to Derek Wood, that summarized a secret intelligence report concerning an explosion at the Soviet naval facility at Severomorsk. On October 1, 1984, at Dulles International

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[1] A two-day search was conducted to find the missing photographs. Petitioner participated in the search and, when asked, reported that he had not seen any of the photographs. Pet. App. 6a; Gov't C.A. Br. 6.

Airport, petitioner was arrested as he was about to board a plane for London. In a post-arrest statement, petitioner at first denied knowledge of the three photographs and insisted on his innocence. After additional questioning, however, he admitted that he had stolen the photographs from his co-worker's desk on July 30. He explained that he had removed the borders containing the "Secret" classification and the "Warning Notice," and had then forwarded the photographs to *Jane's Defence Weekly*. Pet. App. 6a-7a; Gov't C.A. Br. 8-10.[2]

That night, law enforcement officers searched petitioner's home and found an envelope marked "For Derek Wood only." Inside the envelope were excerpts from two NISC intelligence reports known as "Weekly Wires." The "Weekly Wires" were marked "Secret" at the bottom of every page. Both excerpts pertained to the explosion at the Severomorsk Naval base. Pet. App. 7a-8a; Gov't C.A. Br. 10-11.

The evidence at trial established that KH-11 photographic imagery is used by the intelligence community to understand external threats and to provide policy makers with intelligence information. Government experts explained that there has never been an authorized disclosure of KH-11 photographic images, and, despite three unauthorized disclosures in 1976, 1980, and 1981, foreign agents could learn additional information regarding our

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[2] The evidence at trial showed that the day after petitioner mailed the photographs to *Jane's Defence Weekly*, petitioner wrote to Derek Wood: "I hope you will remember me when next year's budget is put together or when there is a vacancy. Without hesitation, you can have me at the drop of a hat * * *." Two weeks later, in a letter to a JFS editor, petitioner wrote: "At any rate I intend to get out of this pit as soon as I can. Hopefully, to JDW in January if Derek Wood has a position. You cannot believe how tired I am of all this idiocy." Gov't C.A. Br. 5 n.5.

intelligence capabilities from analyzing the photographs that petitioner sent to *Jane's Defense Weekly*.[3] The evidence further showed that the "Weekly Wire" excerpts found in petitioner's residence would enable a Soviet intelligence officer to understand and evaluate our capacity to gather intelligence; to discover what we know about Soviet storage of biological and radiological weapons; and to learn that we are able to identify the "signatures" on Soviet vessels.[4] Gov't C.A. Br. 11-13.

2. The court of appeals affirmed (Pet. App. 1a-60a). The court first rejected petitioner's contention that Sections 793(d) and (e) apply only to those persons who engage in "classic spying and espionage activity" by transmitting "national security secrets to agents of foreign governments with intent to injure the United States" (Pet. App. 9a (quotation and footnote omitted)). The court noted that, as petitioner had conceded, "the statutes themselves, in their literal phrasing, are not ambiguous on their face and provide no warrant for his contention" (*id.* at 10a (footnote omitted)). In particular, the court explained (*ibid.*), Section 793(d) applies to "whoever" transmits national defense information to "a person not entitled to receive it," and Section 793(e) applies to "whoever" retains such information without delivering it to an authorized

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[3] For example, the photographs revealed that the KH-11 was still operational, allowing a comparison of current capabilities with previous estimates and thus permitting other countries to take informed counter-measures. As proof of the value of the photographs, a CIA official testified that the government would have paid more than $100 to retrieve the photographs prior to publication. Gov't C.A. Br. 12.

[4] In order to establish the value of the "Weekly Wire" excerpts, the government introduced evidence that the United States would have paid more than $100 to prevent the disclosure of the "Weekly Wires." Gov't C.A. Br. 13.

person. Neither statute, the court stated, is limited by its terms to spies or to "agent[s] of a foreign government," and neither contains an "exemption in favor of one who leaks to the press" (Pet. App. 10a-11a). The court of appeals also found nothing in the legislative history of the statute to support petitioner's limiting construction. The court noted (Pet. App. 14a) that a companion provision, Section 794, "prohibits disclosure to an 'agent * * * [of a] foreign government' " and thereby "covers the act of 'classic spying.' " By contrast, the court observed, Sections 793(d) and (e) "cover a much lesser offense than that of 'spying' and extend[ ] to disclosure to *any* person 'not entitled to receive' the information" (Pet. App. 14a (emphasis in original)). The court explained that the difference in the scope of the statutes accounts for the difference in penalties attached to the two provisions: Section 794 carries a maximum penalty of death or life imprisonment, while Sections 793(d) and (e) fix the maximum penalty at ten years' imprisonment. The court also pointed out that the sponsors of Section 793(d) understood the phrase "one not entitled to receive it" to include not merely agents of a foreign power, but *any* person whose receipt of covered information would be " 'against any statute of the United States or against any rule or regulation prescribed' " (Pet. App. 15a n.12, quoting 54 Cong. Rec. 3586 (1917) (Sen. Overman)). Finally, the court found no support in the legislative history for petitioner's assertion that Section 793 should be construed to exempt transmissions of information to the press (Pet. App. 19a-20a).[5]

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[5] Relying on this Court's decision in *Branzburg* v. *Hayes*, 408 U.S. 665 (1972), the court of appeals also rejected the claim that unless an exemption for disclosures to the press is "read into" Sections 793(d) and (e), those provisions would violate the First Amendment (Pet. App. 20a-22a). The court explained that "it seems beyond controversy that a recreant intelligence department employee who had abstracted

The court of appeals next held that Section 793 is not unconstitutionally vague. The court found that the phrase "relating to the national defense" was sufficiently clear and that the district court had adequately explained that phrase to the jury (Pet. App. 26a-28a). The court observed that "[w]ith the scienter requirement of Sections 793(d) and (e), bulwarked with the defendant's own expertise in the field of governmental secrecy and intelligence operations, the language of the statutes, 'relating to the national security,' was not unconstitutionally vague as applied to this defendant" (*id.* at 32a). The court further held that the phrase "entitled to receive" is sufficiently clear, particularly in light of the classification system set out under 18 U.S.C. App. 1 for the protection of national security information (Pet. App. 33a). The court of appeals also discerned no fatal overbreadth in the language of Sections 793(d) and (e) (Pet. App. 35a-37a).

Finally, the court of appeals rejected petitioner's challenge to his conviction on the two counts charging theft of government property, in violation of 18 U.S.C. 641 (Pet. App. 37a-40a). The court found no need to decide whether "information" constitutes "property" for purposes of Section 641, because petitioner had been charged with stealing "specific, identifiable tangible property, which will qualify as such for larceny or embezzlement under any possible definition of the crime of theft" (Pet. App. 39a). The court also rejected the contention that Section 641 is inapplicable because petitioner transmitted the stolen property to the press. The court explained (Pet. App. 39a-40a) that "[t]he mere fact that one has stolen a

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from the government files secret intelligence information and had willfully transmitted or given it to one 'not entitled to receive it' as did [petitioner] * * *, is not entitled to invoke the First Amendment as a shield to immunize his act of thievery" (*id.* at 23a).

document in order that he may deliver it to the press, whether for money or for other personal gain, will not immunize him from responsibility for his criminal act. To use the first amendment for such a purpose would be to convert the first amendment into a warrant for thievery."

Judge Wilkinson wrote a concurring opinion (Pet. App. 47a-57a). In his view, the First Amendment interests at stake were not "insignificant" (*id.* at 47a), but he also explained that "[t]he way in which th[e] photographs were released * * * threaten[ed] a public interest that is no less important—the security of sensitive government operations" (*id.* at 48a-49a). In weighing those claims "[i]n the national security field," Judge Wilkinson stated, the courts must "perform [their] traditional balancing roles with deference to the decisions of the political branches of government" (*id.* at 50a). Under that principle, Judge Wilkinson concluded that "the application of this particular law to this particular defendant took place in accordance with constitutional requirements" (*id.* at 52a).

Judge Phillips concurred in the judgment and in Judge Wilkinson's opinion (Pet. App. 58a-60a). In his separate opinion Judge Phillips agreed with Judge Wilkinson that the case presented "real and substantial" issues under the First Amendment (*id.* at 58a). He concluded, however, that the trial court's instructions to the jury resolved any vagueness in the statutes at issue (*id.* at 59a).

ARGUMENT

1. Petitioner first contends (Pet. 17-21) that Sections 793(d) and (e) do not reach " '[t]he source who leaks defense information to the press' " (Pet. 17 (citation omitted)). The plain language of the statute, as petitioner implicitly concedes (see Pet. 17-18 n.7), flatly contradicts that claim. By its terms, Section 793(d) reaches "[w]ho-

ever," lawfully having access to any photograph "relating to the national defense," delivers or transmits that photograph "to any person not entitled to receive it." Petitioner does not assert, nor can he, that the editors of *Jane's Defence Weekly* were "entitled to receive" the photographs of the Soviet aircraft carrier—photographs that had been expressly marked "Secret" and that bore a "Warning Notice" that "[i]ntelligence [s]ources" were implicated (Pet. App. 5a-6a). Similarly, Section 793(e) applies without qualification to "[w]hoever having unauthorized possession of * * * any document * * * relating to the national defense * * * willfully retains the same and fails to deliver it to the officer or employee of the United States entitled to receive it." It does not exempt persons, like petitioner, who retain unauthorized material for the purpose of leaking it to the press.[6]

Petitioner's repeated suggestions that Section 793 applies only to "spies" (Pet. 18) and "those engaged in espionage" (Pet. 19) are also belied by the revealing differences between Section 793 and Section 794. As the court of appeals noted (Pet. App. 12a-14a), Section 794, unlike Section 793, proscribes the transfer of information relating to the national defense "to any foreign government" or to "any representative, officer, agent, employee, subject, or citizen thereof" (18 U.S.C. 794(a)). Section 794 thus expressly prohibits what petitioner has termed "classic spying" (see Pet. App. 9a), and for that reason it carries

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[6] Professors Edgar and Schmidt, on whose study of Section 793 petitioner extensively relies (see Pet. 17-18, 21, 25-26), have explained that "the language of the statute[ ] has to be bent somewhat to exclude publishing national defense material from its reach, and tortured to exclude from criminal sanction preparatory conduct necessarily involved in almost every conceivable publication of defense matters." Edgar and Schmidt, *The Espionage Statutes and Publication of Defense Information*, 73 Colum. L. Rev. 929, 937 (1973).

a maximum penalty of death or life imprisonment. Section 793, by contrast, is not limited to disclosures to representatives of foreign governments, but prohibits delivering national defense information to "any person not entitled to receive it" (Section 793(d)) and retaining unauthorized possession of national defense information and failing to deliver it to an authorized person (Section 793(e)). In accordance with its broader scope, Section 793 carries the less severe maximum penalty of ten years' imprisonment, a $10,000 fine, or both. That statutory structure demonstrates that Congress knew how to proscribe the act of "classic spying" when it wished to do so. See *Lehman* v. *Nakshian,* 453 U.S. 156, 162 (1981); *Galloway* v. *United States,* 319 U.S. 372, 389 (1943). Under traditional principles of statutory construction, the difference between the sections must therefore be seen as intentional. See *Fedorenko* v. *United States,* 449 U.S. 490, 512 (1981); *Lawrence County* v. *Lead-Deadwood School Dist. No. 40-1,* 469 U.S. 256, 267 (1985); *United States* v. *Erika, Inc.*, 456 U.S. 201, 208 (1982).[7]

Petitioner does not deny that his conduct is proscribed by the plain language of Section 793. Relying on snippets of legislative history, however, he contends (Pet. 17-21) that Congress did not intend Section 793 to apply as broadly as its language suggests. As a preliminary matter,

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[7] Congress enacted Sections 793(d) and 794 at the same time (see Pet. App. 12a-13a), and " '[w]here Congress includes particular language in one section of a statute but omits it in another section of the same Act, it is generally presumed that Congress acts intentionally and purposely in the disparate inclusion or exclusion.' " *Russello* v. *United States,* 464 U.S. 16, 23 (1983) (citation omitted). Accord *INS* v. *Cardoza-Fonseca,* No. 85-782 (Mar. 9, 1987), slip op. 10. See also *Kissinger* v. *Reporters Comm. for Freedom of the Press,* 445 U.S. 136, 148-149 (1980); *Transamerica Mortgage Advisors, Inc.* v. *Lewis,* 444 U.S. 11, 19-20 (1979).

we note that where, as here, the plain language is unambiguous, there is no need to resort to the legislative history. *Rubin* v. *United States,* 449 U.S. 424, 430 (1981). See also *United States* v. *Taylor,* No. 87-573 (June 24, 1988), slip op. 2 (Scalia, J., concurring) ("[t]he text is eminently clear, and we should leave it at that"). In any event, petitioner points to nothing in the legislative history that "would require [the Court] to question the strong presumption that Congress expresse[d] its intent through the language it cho[se]." *INS* v. *Cardoza-Fonseca,* No. 85-782 (Mar. 9, 1987), slip op. 10 n.12.

Petitioner first isolates brief excerpts from the legislative debates in which "supporters repeatedly stated that [Section 793] was designed to stop spies and that other Americans had nothing to fear" (Pet. 18). But petitioner overstates the evidence on that point. For example, although Senator Pittman declared that "[t]he object of this act is to punish spies" (*ibid.* (citing 54 Cong. Rec. 3599 (1917)), it is clear from the context of his remarks that the Senator sought merely to allay an opponent's concern that, under what is now Section 793(a), a citizen could be punished for entering a navy yard to inquire what, if any, information he was entitled to have by law. See 54 Cong. Rec. 3596-3599 (1917). Similarly, although Senator Lee referred to "the ordinary methods of spies" (*id.* at 3592 (cited in Pet. 18 n.8)), he invoked that phrase to *criticize* the legislation because, in his view, the law "embraces a lot of innocent things that the American has been in the habit of doing" and because the law was *not* confined, as Senator Lee thought it should be, "to the spy that st[eals] the signal book off th[e] ship" (54 Cong. Rec. 3592-3593 (1917)).[8] And while Senator Overman used the words

[8] Indeed, Senator Lee complained that the statute would forbid the very activity that petitioner now claims he was involved in (see Pet. 6):

"spies and traitors" in explaining why the statute included "buildings" and "offices" among the places to which access might be restricted (*id.* at 3600 (cited in Pet. 18 n.8)), Senator Cummins, an opponent of the legislation, objected precisely because the statute was not expressly limited to the acts of spies and traitors. See 54 Cong. Rec. 3600 (Sen. Cummins) ("I wish the Senator * * * would use the word 'spy' in the act and the word 'traitor' in the act instead of in his speeches"). Finally, and in any event, petitioner points to no evidence that those legislators who referred to "spies" and "traitors" believed that the statute could be used *only* to prohibit what he terms "classic spying."

Petitioner also notes (Pet. 18-19) that in enacting the Espionage Act of 1917, and in amending the statute in 1950, Congress chose not to include a provision that would have imposed criminal sanctions on the press for publishing information relating to the national defense. See generally Edgar and Schmidt, *The Espionage Statutes and Publication of Defense Information,* 73 Colum. L. Rev. 929, 946-965, 1013-1014 (1973). Petitioner infers that "[s]ince the legislators realized that [press] stories were based on information from government officials, * * * it is apparent that Congress also refused to criminalize disclosures by officials who leak to the press" (Pet. 18-19). That contention is meritless. Indeed, as Professors Edgar and Schmidt acknowledge, the fact that Congress enacted the predecessor to Section 793 at the same time that it rejected the press censorship provision demonstrates that the "rejection of [the latter] does not logically mandate impu-

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"It is a very reprehensible thing to draw a statute * * * that it can be used in such ways as to punish a citizen who is doing a patriotic thing in proclaiming that his country is undefended, and pointing out where her defenses should be strengthened" (54 Cong. Rec. 3593 (1917)).

tation of altered understanding about the scope of [the former]." Edgar and Schmidt, *supra,* 73 Colum. L. Rev. at 1014. Petitioner does not identify any legislative history suggesting that Congress intended to extend the immunities of the press to government employees, like petitioner, who pilfer classified information and deliver it to persons, including the press, who are not entitled to possess it.[9] As this Court has explained in an analogous context, "[i]t would be frivolous to assert * * * that the First Amendment, in the interest of securing news or otherwise, confers a license on either the reporter or his news sources to violate valid criminal laws. Although stealing documents or private wiretapping could provide newsworthy information, neither reporter nor source is immune from conviction for such conduct, whatever the impact on the flow of news." *Branzburg* v. *Hayes,* 408 U.S. 665, 691 (1972).[10]

Petitioner also asserts (Pet. 19-20) that because Congress has enacted several other specific non-disclosure statutes, Sections 793(d) and (e) must not reach "the general practice of leaking." Neither Section 793(d) nor Section 793(e), however, is addressed to "the general prac-

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[9] The congressional debates suggest, if anything, exactly the opposite. One of the proponents of the 1917 legislation, Senator Overman, explained that "[a] man ought to be punished if he has [documents relating to the national defense] in his possession and he communicates them to the enemy *or anybody else.*" 54 Cong. Rec. 3586 (1917) (emphasis added).

[10] Petitioner's reliance (Pet. 19) on the remarks in 1949 of Attorney General Tom Clark is particularly misplaced since, in explaining why the statute would not stifle press reporting, he stated that "nobody other than a spy, saboteur, *or other person who would weaken the internal security of the Nation* need have any fear of prosecution under either existing law or the provisions of this bill." 95 Cong. Rec. 9749 (1949).

tice of leaking." To the contrary, Section 793(d) is narrowly confined to those persons who have lawful access to materials relating to the national defense and who deliver those materials to persons who are "not entitled to receive" them. Likewise, Section 793(e) is confined to those persons who retain unauthorized materials relating to the national defense. That subsection therefore has nothing to do with leaking at all. In any event, the fact that there may be some overlap among the cited statutes "is neither unusual nor unfortunate." *SEC* v. *National Securities, Inc.*, 393 U.S. 453, 468 (1969). Overlap among statutes is not a basis on which to relieve petitioner of his liability under the plain terms of Section 793. See *United States* v. *Naftalin*, 441 U.S. 768, 778 (1979) (the fact that two acts prohibit the same conduct "does not absolve [the defendant] of guilt for the transactions which violated the statute under which he was convicted"); *Edwards* v. *United States*, 312 U.S. 473, 484 (1941) (footnote omitted) (overlapping statutes "can exist and be useful, side by side"). See generally *United States* v. *Batchelder*, 442 U.S. 114, 123-124 (1979).[11]

2. Petitioner next contends (Pet. 21-25) that the theft-of-government-property statute, 18 U.S.C. 641, does not cover his conduct, because there is no basis for believing that "Congress intended that the * * * statute * * * be used to punish those who leak government documents" (Pet. 23). That claim, like petitioner's similar assertion about Section 793, founders on the plain language of the

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[11] Petitioner cites (Pet. 20-21) several remarks by various government officials to show that, over the years, some members of the Executive Branch have questioned whether any criminal statute applies to leaks of classified information to the press. Whatever the accuracy of those isolated "generalizations," they are plainly "inadequate to overcome the plain textual indication" that Section 793 applies to petitioner's conduct. *United Savings Ass'n* v. *Timbers of Inwood Forest Associates, Ltd.*, No. 86-1602 (Jan. 20, 1988), slip op. 13.

statute. Section 641 applies by its terms to "[w]hoever embezzles, steals, purloins, or knowingly converts to his own use or the use of another, or without authority, sells, conveys or disposes of any * * * thing of value of the United States or any department or agency thereof * * *." As the court of appeals observed, the statute "is written in broad terms with the clear intent to sweep broadly" (Pet. App. 38a). There is no exception for persons, like petitioner, who steal and thereafter market their wares to the press. Petitioner's suggestion (Pet. 22-23) that Section 641 should be read narrowly in light of other, specific anti-disclosure statutes once more overlooks the fact that statutory overlap is common and does not justify ignoring the plain language of a more general statute.

Petitioner also contends (Pet. 24-25) that this Court should resolve the question whether Section 641 applies to the theft of intangible property such as government information. That question, however, is not presented in this case. Petitioner stole three photographs and excerpts from the "Weekly Wire," an NISC intelligence report. Thus, as the court of appeals explained (Pet. App. 39a), here "[w]e are dealing with specific, identifiable tangible property, which will qualify as such for larceny or embezzlement under any possible definition of the crime or theft." Petitioner's claim that the photographs and reports were valued only because of the information they contained may well be true, but it does not diminish the fact that the materials themselves were tangible.[12]

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[12] For that reason, petitioner's allegation (Pet. 24-25) of a conflict with two Ninth Circuit decisions is meritless. In *Chappell* v. *United States*, 270 F.2d 274, 276-278 (1959), the court of appeals held that labor – the services of a painter – is not a "thing of value" as that term is used in Section 641. The present case, by contrast, involves the theft of photographs and reports, which were tangible items, even though they derived much of their value from the classified information they

3. Finally, petitioner contends (Pet. 25-27) that Sections 641 and 793 are unconstitutionally vague and overbroad. That claim does not warrant further review. Because of "[t]he strong presumptive validity that attaches to an Act of Congress," this Court has held "many times that statutes are not automatically invalidated as vague simply because difficulty is found in determining whether certain marginal offenses fall within their language." *United States* v. *National Dairy Prods. Corp.*, 372 U.S. 29, 32 (1963). Moreover, the Court has emphasized, "[i]n determining the sufficiency of the notice a statute must of necessity be examined in the light of the conduct with which a defendant is charged" (*id.* at 33). In the present case, as the court of appeals explained (Pet. App. 34a), petitioner knew perfectly well that he was stealing classified information, delivering it to persons not entitled to receive it, and retaining possession of it instead of returning it to its rightful owners. Indeed, petitioner went to extraordinary lengths to conceal both the theft as well as the classified nature of the purloined materials.

As for petitioner's claim (Pet. 26-27) that the phrase "relating to the national defense" in Section 793 is excessively vague, we note that this Court rejected that precise contention in *Gorin* v. *United States*, 312 U.S. 19 (1941). Like petitioner, Gorin was convicted under the Espionage Act of 1917 of delivering documents "connected with the

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contained. The Ninth Circuit seems to have recognized that very point in the second case cited by petitioner, *United States* v. *Tobias*, 836 F.2d 449 (1988), cert. denied, No. 87-6545 (Apr. 4, 1988). There, the court distinguished *Chappell* and held that cryptographic cards, which are used to code and decode classified information, are tangible and may therefore give rise to a Section 641 prosecution. Cf. also *United States* v. *Friedman*, 445 F.2d 1076 (9th Cir.), cert. denied, 404 U.S. 958 (1971) (upholding Section 641 conviction for theft of grand jury transcripts).

national defense." The Court held that the phrase "national defense" has a "well understood connotation" that refers " 'to the military and naval establishments and the related activities of national preparedness' " (*id.* at 28 (citation omitted)). The Court therefore concluded that the language in the Act is "sufficiently definite to apprise the public of prohibited activities and is consonant with due process" (*ibid.*).[13]

CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted.

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[13] Petitioner's suggestion (Pet. 26) that Section 641 is overbroad if it covers "the unauthorized disclosure of any government document" mistakes the nature of the statute. Section 641 does not proscribe *disclosure* at all; it proscribes *theft* of government property.

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